SUPREME COURT, U. S

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In The
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71 - 591

BETTY B. RAWLS,

Petitioner,

versus

THE CONDÉ NAST PUBLICATIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The
Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

BETTY B. RAWLS,

Petitioner,

versus

THE CONDÉ NAST PUBLICATIONS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Betty B. Rawls, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled cause on July 13, 1971.

Citations to Opinions Below

The judgment of the United States District Court for the Middle District of Florida entered April 3, 1970 on the jury verdict returned on March 20, 1970 is unreported and is printed in the Appendix hereto (App. 9). The opinion of

the United States Court of Appeals for the Fifth Circuit entered July 13, 1971 is reported at 446 F.2d 313 and is printed in the Appendix hereto (App. 10).

Statement of Grounds on Which Jurisdiction Is Invoked

The judgment of the Court of Appeals was entered on July 13, 1971 (App. 24). On August 11, 1971 the Court of Appeals entered an order denying petitioner's objection to the taxing of costs on appeal against petitioner in the amount of $4,460.28 (App. 29). On September 9, 1971 the Court of Appeals entered an order denying petitioner's petition for rehearing (App. 29). On September 28, 1971 the Court of Appeals entered an order staying the mandate for a period of thirty days, conditioned upon petitioner's filing a bond in the sum of $5,000.00 (App. 30). Petitioner will not file the required bond.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

I.

Whether petitioner's right of trial by jury guaranteed by the Seventh Amendment of the Constitution of the United States was violated by the Court of Appeals' action in reversing the judgment entered in the trial court on the jury's verdict for petitioner on Count Two.

II.

Whether the District Court's error in charging the jury as to the controlling Florida law in this diversity case was properly considered by the Court of Appeals as "technical only, and not harmful."

Constitutional Provisions Involved

Amendment VII to the Constitution of the United States:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Statement of the Case

The Court of Appeals has reversed a judgment for $5,000.00 compensatory and $50,000.00 punitive damages awarded to petitioner by a jury in an action for trespass and violation of her right of privacy.

Petitioner, a recent divorcee who worked part time to supplement child support payments by her ex-husband, lived alone with her 14-year old daughter and her 11-year old son. While petitioner was absent from her home and her children were there alone, respondent's agents, acting under direction of a member of respondent's advertising staff, entered petitioner's home for the purpose of taking photographs of a fashion model for publication in an advertisement promoting Jaguar automobiles and B. H. Wragge clothes in respondent's *Vogue* magazine. Among other activities at petitioner's home, respondent's agents drove a Jaguar across petitioner's lawn and onto her patio, which was not designed for accommodating automobiles. About thirty minutes after the intrusion into petitioner's home, petitioner arrived home. She was disturbed and frightened by the presence and activities of respondent's agents.

Petitioner testified and some of respondent's witnesses denied that she asked them to leave. Some witnesses testified that petitioner said "all right" when they told her that they would finish up and leave in about ten minutes. But it was undisputed that petitioner had not given her consent to the entry or use of her home prior to the entry. And it was undisputed that respondent's agents knew when they entered that petitioner had not given her consent.

Upon learning several weeks later that respondent planned to publish one of the photographs taken in petitioner's home, she immediately notified respondent that she objected to publication of any picture taken on the occasion of the unauthorized entry of her home. Because respondent's agreement with one of its advertisers required that the outfit worn by the model in petitioner's home be shown in the advertisement, respondent published the picture in the commercial advertisement in its February, 1969 issue of *Vogue*, in spite of petitioner's objection, after having retouched the picture so as to obliterate anything in the picture that would identify the picture with petitioner or her home.

Petitioner instituted action in the Circuit Court of Duval County, Florida. Respondent promptly removed the action to the United States District Court for the Middle District of Florida.

Petitioner's complaint was in two Counts, each alleging that respondent's agents wrongfully entered petitioner's home in her absence, and without her prior consent, for the purpose of taking photographs for publication by respondent in a commercial advertisement in *Vogue* magazine.

Count Two incorporated the factual allegations of Count One with respect to the wrongful entry for the purpose of

taking photographs and, in addition, made the further allegation that several weeks later respondent published one of the photographs taken in petitioner's home after being notified that petitioner objected to such publication (App. 4).

Both Counts claimed a trespass and wrongful invasion of plaintiff's right of privacy. Each demanded judgment for compensatory and punitive damages in the same amount. Each demanded trial by jury.

Under the controlling law of Florida, the entry by one person upon the premises of another without such other's prior consent is trespass entitling the injured party to at least nominal damages. [*Leonard* v. *Nat Harrison Associates, Inc.* (Fla. App. 2d Dist. 1960), 122 So.2d 432, 433; *Kelliher* v. *Stone & Webster, Inc.* (5th Cir. 1935), 75 F.2d 331, 333.] Also, an intrusion into one's home is an invasion of privacy [*Thompson* v. *City of Jacksonville* (Fla. App. 1st Dist. 1961), 130 So. 2d 105, *cert. denied* (Fla. 1962), 147 So.2d 530] entitling the injured party to at least nominal damages [*Cason* v. *Baskin* (1944), 155 Fla. 198, 20 So.2d 243, 247].

At respondent's request and over petitioner's objection, the trial judge charged the jury that

> "If you find, ladies and gentlemen, from a preponderance of the evidence that the plaintiff, Mrs. Rawls, after she came home, by her conduct gave her actual or implied consent for the defendant's employee to remain in her home and to continue to take photographs, then you cannot award her any damages as to Counts One and Two for wrongful entry or invasion of privacy."
>
> (App. 14).

During the jury's deliberation they sent a note to the Judge asking:

> "If the Conde Nast People entered without Mrs. Rawls Consent, but stayed with her implied Consent — are they guilty of trespass?"
>
> (App. 14).

Instead of answering the question with a simple "yes" as requested by petitioner, the judge repeated his charge above quoted.

The jury returned a general verdict of "not guilty" as to Count One. As to Count Two, the jury found for petitioner and assessed her compensatory damages at $5,000.00 and her punitive damages at $50,000.00.

The trial judge denied petitioner's motion for a new trial on Count One in which motion petitioner assigned error in the giving of the above-quoted charge in respect to actual or implied consent subsequent to the wrongful entry. The trial judge denied respondent's motion for judgment notwithstanding the verdict on Count Two. Respondent appealed from petitioner's judgment on Count Two. Petitioner cross-appealed from the judgment on Count One.

The Court of Appeals, first considering petitioner's cross-appeal relating to Count One, agreed with petitioner's contention that consent to an entry of one's premises as a defense to an action for wrongful entry must be a consent given prior to the entry (App. 16). The Court said that the trial judge's charge was "imprecise" but that the error "was technical only and not harmful" (App. 18). Accordingly, the Court of Appeals affirmed the judgment for respondent on Count One.

Proceeding to Count Two, the Court of Appeals held that the jury, by its verdict of "not guilty" on Count One, specifically found Conde' Nast not guilty of the claimed intrusion (Opinion, p. 15). And because the picture published with the commercial advertising matter in *Vogue* had been touched up so as to obliterate anything in the picture that identified it with the petitioner or her home, the Court of Appeals held that the District Court erred in not granting respondent's motion for judgment notwithstanding the verdict, and accordingly reversed the judgment for petitioner on Count Two with directions to the District Court to enter judgment for respondent on that Count.

Reasons for Granting the Writ

1. The Court of Appeals failed to accord to petitioner's judgment for compensatory and punitive damages on Count Two the presumptions to which it was entitled under the Seventh Amendment. The Court of Appeals was obliged by this Court's decisions to reconcile the verdict on the two Counts, if it could, and examine the record to determine whether petitioner's verdict and the allegations of Count Two were supported by the evidence. *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.* (1962), 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798; *Arnold* v. *Panhandle and Santa Fe Ry. Co.* (1957), 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889; *Rua* v. *United States* (5th Cir. 1963), 321 F.2d 140, 143, *cert. denied* (1964), 377 U.S. 969, 84 S.Ct. 1651, 12 L.Ed.2d 738.

2. Having found erroneous the Court's charge to the jury on the effect of actual or implied consent by petitioner subsequent to the wrongful entry, the Court held that "the error was technical only, and not harmful." In so holding, the Court of Appeals failed to recognize that the jury's request

for advice on this subject evidenced its primary concern with the subject. *Fiswick* v. *United States* (1946), 329 U.S. 211, 220, 67 S.Ct. 224, 229, 91 L.Ed. 196. Petitioner's right to have the jury correctly charged on this subject was a substantial right as to which the harmless error rule is inapplicable. *United States* v. *River Rouge Improvement Co.* (1926), 269 U.S. 411, 420-21, 46 S.Ct. 144, 147-48, 70 L.Ed. 339; *Fillippon* v. *Albion Vein Slate Co.* (1919), 250 U.S. 76, 82, 39 S.Ct. 435, 437, 63 L.Ed. 853; *Bollenbach* v. *United States* (1946), 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350; *Greenbelt Cooperative Publishing Ass'n* v. *Bresler* (1970), 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed.2d 6; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* (1962), 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777; *Yazoo & M.V.R. Co.* v. *Mullins* (1919), 249 U.S. 531, 39 S.Ct. 368, 63 L.Ed. 754.

3. In holding that by its "not guilty" verdict on Count One the jury "specifically found" that respondent was "not guilty of the claimed intrusion" the Court of Appeals failed to recognize that Count Two incorporated all of the allegations of wrongful entry contained in Count One and that the jury's verdict for petitioner on Count Two constituted a finding that there was a wrongful entry of petitioner's home not excused by any actual or implied consent subsequently given by petitioner. The jury's verdict on Count Two was, therefore, entitled to at least as much weight as the jury's finding of "not guilty" on Count One which, of course, was not a "specific finding" on any particular issue arising on that Count. The trial judge had told the jury that they could not award damages on either Count One or Count Two if they found that petitioner had given actual or implied consent subsequent to the entry. Thus, the jury's verdict awarding damages on Count Two was a clear finding that there had been no actual or implied consent.

4. The Court of Appeals was not permitted to speculate, as it did, as to the reason for the jury's returning the "not guilty" verdict on Count One and the verdict awarding petitioner damages on Count Two. *Dunn* v. *United States* (1932), 284 U.S. 390, 52 S.Ct. 189; *Rua* v. *United States* (5th Cir. 1963), 321 F.2d 140, 143, *cert. denied* (1964), 377 U.S. 969, 84 S.Ct. 1651, 12 L.Ed.2d 738.

5. Even if the verdicts are legally inconsistent, that circumstance is no ground for depriving petitioner of her judgment for compensatory and punitive damages. Obviously the jury intended that petitioner should have the benefit of her verdict on Count Two in spite of the "not guilty" verdict on Count One. *Steckler* v. *United States* (2d Cir. 1925), 7 F.2d 59, 60; *Dunn* v. *United States* (1932), 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356; *United States* v. *Vastine* (3d Cir. 1966), 363 F.2d 853.

6. But the verdicts are not legally inconsistent. All essential factual allegations of Count One were incorporated in Count Two. And the jury may have found that the return of two verdicts for the petitioner would require a division of the total damages to be awarded between the two Counts, a useless undertaking and one with respect to which the court and counsel should have been more aware. Only if the jury had found that the publication of the picture taken in petitioner's home did not affect the amount of damages to be awarded would they have been justified in awarding damages to plaintiff on Count One and in returning a verdict of "not guilty" on Count Two. Had the jury done his there could be no claim of inconsistent verdicts. No rational basis exists for claiming that the verdicts rendered are incorrect. Obviously the jury found that plaintiff was entitled to compensation for the total insult, including respondent's publication of the picture taken in petitioner's home for its own

commercial purposes after being notified of petitioner's objection to such use of the picture that was a part of the wrongful intrusion into her home.

7. This Court has been careful to protect verdicts in diversity cases involving state law [*Mercer* v. *Theriot* (1964), 377 U.S. 152, 84 S.Ct. 1157, 12 L.Ed.2d 206, reversing the Fifth Circuit decisions reported in 262 F.2d 754 and 316 F.2d 635; *Gibson* v. *Phillips Petroleum Co.* (1956), 352 U.S. 874, 77 S.Ct. 16, 1 L.Ed.2d 77, reversing the Fifth Circuit decision reported in 232 F.2d 13; *Dick* v. *New York Life Ins. Co.* (1959), 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935, reversing the decision of the Eighth Circuit reported in 252 F.2d 43], just as it has in cases controlled by Federal law [*Harris* v. *Pennsylvania Railroad Co.* (1959), 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed.2d 1 (see also cases cited in Appendix to Opinion of Mr. Justice Douglas); *Inman* v. *Baltimore & Ohio Railroad Co.* (1959), 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed.2d 198; *Webb* v. *Illinois Central Railroad Co.* (1957), 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503; *Rogers* v. *Missouri Pacific Railroad Co.* (1957), 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493; *Arnold* v. *Panhandle and Santa Fe Railroad Co.* (1957), 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889; *Gallick* v. *Baltimore and Ohio Railroad Co.* (1963), 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618; *Harrison* v. *Missouri Pacific Railroad Co.* (1963), 372 U.S. 248, 83 S.Ct. 690, 9 L.Ed.2d 711; *Dennis* v. *Denver & Rio Grande Western Railroad Co.* (1963), 375 U.S. 208, 84 S.Ct. 291, 11 L.Ed.2d 256; *Sentilles* v. *Intra-Caribbean Shipping Corp.* (1959), 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142].

8. Only by exercise of this Court's power of supervision can the Court of Appeals' departure from the accepted and usual course of judicial proceedings be corrected and petitioner's right to her jury verdict under the Seventh Amendment saved.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October, 1971.

COMPLAINT

(Filed April 24, 1969)

CIRCUIT COURT OF DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 69-3265
DIVISION - I

The plaintiff, Betty B. Rawls, sues the defendant, The Conde' Nast Publications, Inc., a corporation, and alleges:

Count One

1. The amount in controversy exceeds the sum of $1,000.00, exclusive of interest and costs.

2. The defendant, The Conde' Nast Publications, Inc., is a corporation organized and existing under the laws of the State of New York and having its principal place of business in New York, New York. This cause of action arises out of a transaction or operation connected with or incidental to business and business ventures conducted, engaged in and carried on by the defendant in the State of Florida.

3. At all times hereinafter mentioned, the plaintiff, Betty B. Rawls, who was and is divorced from her husband, was in lawful possession of that certain dwelling house located at 2047 University Boulevard, South, Jacksonville, Duval County, Florida, which was used and occupied as the family residence of plaintiff and her two minor children.

4. In or about October 1968, the defendant sent one Alexandra Penney, who was employed by defendant as Fashion Promotion Editor of "Vogue", a magazine published by defendant, to Florida to direct and supervise other agents and employees of defendant in obtaining photographs to be pub-

lished by defendant in "Vogue" in an article promoting Jaguar automobiles and clothes designed and manufactured by B. H. Wragge. The preparation and publication of such fashion article was part of defendant's business of publishing a fashion magazine for sale to the general public and the defendant's business of selling advertising space to concerns catering to the women's fashion market, including B. H. Wragge, retail merchandisers of clothes manufactured by B. H. Wragge, and manufacturers of cloth used in clothes manufactured by B. H. Wragge, and also including the manufacturers and distributors of Jaguar automobiles.

5. On November 1, 1968, a large group of defendant's agents and employees, acting under the direct supervision and control of the said Alexandra Penney, wrongfully entered plaintiff's said home without requesting or receiving prior authorization from plaintiff. Such entry was made by defendant's agents and employees for the purpose of posing a model employed by defendant in plaintiff's house for the taking of photographs to be used in said fashion promotion article to be published by defendant in "Vogue".

6. Such wrongful entry of plaintiff's said home was made by defendant's agents and employees while plaintiff was temporarily absent from her home and while plaintiff's eleven year old son was in the home alone.

7. After such wrongful entry of plaintiff's said home, defendant's agents and employees rearranged plaintiff's furniture to suit their purposes, drove a Jaguar automobile across plaintiff's lawn and onto plaintiff's patio which was not designed or used for motor vehicle traffic, and took over exclusive possession of plaintiff's living room, directing plaintiff's son and plaintiff's minor daughter, who arrived soon after said wrongful entry, to stay out of the living room and off of the

patio until defendant's agents and employees had completed taking such photographs as they desired.

8. Thereafter, plaintiff returned to her home to find her living room taken over by defendant's agents and employees, all of whom were strangers to her, her living room furniture rearranged, a Jaguar automobile parked on her patio, two of defendant's agents and employees, also strangers to plaintiff, sitting on a picnic table on plaintiff's patio, and plaintiff's children relegated to the steps leading into plaintiff's living room.

9. Plaintiff was surprised, upset and frightened by what she saw when she returned to her home and she immediately demanded that defendant's agents and employees leave the premises. However, defendant's agents and employees wrongfully refused to leave immediately, saying that they would soon complete their assignment and would then leave. Thereafter, defendant's agents and employees continued with their wrongful use and occupation of plaintiff's home over plaintiff's objections until they had completed taking the photographs which they desired.

10. By reason of defendant's said wrongful acts, plaintiff has been deprived of her right of privacy and of her right to the exclusive and unfettered use and possession of her home; plaintiff's lawn, patio and furniture have been damaged; plaintiff has been subjected to mental and physical suffering; plaintiff has become frightened, nervous and upset; and plaintiff has been made to feel insecure and unsafe in her said home.

11. Defendant's said wrongful acts were done wilfully, unlawfully, maliciously and with total and wanton disregard for plaintiff's rights.

WHEREFORE, plaintiff demands judgment against the defendant for compensatory damages in excess of $1,000.00 and for punitive damages in the sum of $1,000,000.00.

Count Two

1-9. Plaintiff realleges the allegations of paragraphs 1 through 9 of Count One.

10. On December 6, 1968, plaintiff learned that defendant planned to publish in the February 1, 1969, issue of "Vogue" magazine one of the photographs taken in plaintiff's home by defendant's agents and employees. Plaintiff immediately demanded that defendant not publish any photograph taken in her home or any captions, headlines, articles, stories or editorial material relating to or arising out of the unauthorized and illegal entry of her home by defendant's agents and employees.

11. Defendant, disregarding plaintiff's demand and acting with full knowledge of plaintiff's objection, wrongfully published one of the photographs taken in plaintiff's home by defendant's employees and agents on page 50 of the February 1, 1969, issue of "Vogue" in an article entitled "from riches to wragge and jaguars".

12. Thereby, defendant wrongfully and maliciously invaded plaintiff's right of privacy, subjecting plaintiff to further mental and physical suffering.

WHEREFORE, plaintiff demands judgment against the defendant for compensatory damages in excess of $1,000.00 and for punitive damages in the sum of $1,000,000.00.

App. 5

Demand for Jury Trial

Plaintiff demands trial by jury.

BEDELL, BEDELL, DITTMAR & SMITH

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Attorneys for Plaintiff

ANSWER

(Filed September 24, 1969)

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 69-337-Civ-J

The Defendant, THE CONDE' NAST PUBLICATIONS, INC., for its answer to the Plaintiff's Complaint, says:

As to Count One

1. It admits the allegations of paragraph No. 1.

2. It admits the first sentence of paragraph No. 2, but denies the remaining allegations of said paragraph.

3. It is without knowledge or information sufficient to form a belief as to the allegations of paragraph No. 3.

4. As to paragraph No. 4, it admits that the Defendant sent Alexandra Penney to Florida, but denies the remaining allegations of said paragraph.

5. It denies the allegations of paragraphs Nos. 5, 6, 7, 8, 9, 10 and 11.

As to Count Two

1. It realleges the answers to the allegations of paragraphs Nos. 1 through 9 of Count One set forth above.

2. It is without knowledge or information with respect to the first sentence of paragraph No. 10 and denies the remaining allegations of said paragraph.

3. It denies the allegations of paragraphs Nos. 11 and 12.

DEFENSES

First Defense

With respect to Count One, the Plaintiff, individually or through other persons, either expressly or impliedly granted agents of Defendant a license or consent to enter Plaintiff's said home, as alleged in Count One.

Second Defense

Defendant moves the Court to dismiss the action with respect to Count Two, because the Complaint fails to state a claim against the Defendant upon which relief can be granted.

Third Defense

With respect to Count Two, Defendant denies that there was any invasion of Plaintiff's privacy by the alleged publication of the photograph taken in Plaintiff's home.

Fourth Defense

With respect to Count Two, Defendant alleges that the Plaintiff either expressly or impliedly consented to the taking of the photographs in her home which are complained of.

Fifth Defense

Defendant moves the Court to dismiss the action on the ground that the Defendant is a corporation organized under the laws of the State of New York, with its principle place of business in the State of New York and was not and is not subject to the service of process within the State of Florida and therefore the Court lacks jurisdiction over this corporate

defendant with respect to the matters alleged in the Complaint.

Sixth Defense

The Plaintiff by her conduct after returning home as alleged in the Complaint, is estopped from complaining of the alleged violations of her rights as set forth in Counts One and Two.

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JUDGMENT

(Entered April 3, 1970)

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

NO. 69-337-Civ-J

This cause having come on for trial before the Court and a jury and the issues having been duly tried, and the jury having duly rendered its verdict on March 20, 1970, finding the defendant, The Conde' Nast Publications, Inc., not guilty as to Count One of the complaint and finding for the plaintiff, Betty B. Rawls, as to Count Two of the complaint and assessing the plaintiff's actual or compensatory damages in the sum of Five Thousand and No/100 Dollars ($5,000.00), and in addition thereto, awarding the plaintiff punitive damages in the sum of Fifty Thousand and No/100 Dollars ($50,000.00), it is

ORDERED AND ADJUDGED that:

1. Plaintiff, Betty B. Rawls, take nothing by Count One of the complaint.

2. Plaintiff, Betty B. Rawls, have and recover of and from defendant, The Conde' Nast Publications, Inc., the sum of Fifty-five Thousand and No/100 Dollars ($55,000.00), together with such costs as may hereinafter be taxed, for all of which let execution issue.

DONE AND ORDERED at Jacksonville, Florida, this 3rd day of April, 1970.

/s/ Charles R. Scott
United States District Judge

OPINION

(Entered July 13, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30009

Before TUTTLE, AINSWORTH and SIMPSON,
Circuit Judges.

SIMPSON, Circuit Judge: In a two count complaint alleging unlawful trespass and invasion of privacy, the appellee-cross appellant, Mrs. Betty B. Rawls, a resident of Jacksonville, Florida, brought suit in the Circuit Court for Duval County, Florida, against appellant-cross appellee, The Conde Nast Publications, Inc., a New York corporation engaged in the business of publishing magazines (including Vogue magazine). We will ordinarily refer herein to the parties as plaintiff and defendant as they were styled in the trial court. The case was removed on diversity grounds, Title 28, U.S.C., Section 1441, to the United States District Court for the Middle District of Florida.

Trial was had to a jury which returned a verdict for the defendant on Count One of the complaint. With respect to Count Two, the verdict was for the plaintiff in the amount of $5,000 compensatory damages and $50,000 punitive damages. The district judge denied plaintiff's motion for a new trial as to Count One and defendant's motion for judgment notwithstanding the verdict as to Count Two and judgment was entered on the verdict. The case is here on Nast's appeal as to Count Two and Mrs. Rawls' cross-appeal as to

Count One. For reasons set out below, we affirm the judgment of the district court as to Count One and reverse and render as to Count Two.

The following facts emerge from the evidence before the jury. In October, 1968, Vogue magazine sent a team consisting of Mrs. Alexandra Penney, Fashion Promotion Editor of Vogue, Norman Parkinson, a fashion photographer, and a professional model to Jacksonville, Florida, to photograph the model on location in Florida, wearing clothing to be featured in the February 1, 1969, issue of Vogue. Pictures were taken at several locations in Jacksonville and elsewhere in North Florida, so as to prepare a layout of several pages. Each picture featured a Jaguar automobile and the same model in examples of B. H. Wragge sports clothing. Mr. Parkinson contacted William Morgan, a Jacksonville architect, for the names and locations of homes which Mr. Morgan had designed in Jacksonville, for the purpose of determining their suitability as locations for photographing the model. He saw the exterior of Mrs. Rawls' home and expressed a wish to use it as one of his locations. Mrs. Rawls was a recent divorcee. The architect's wife, Mrs. Morgan, on October 31, 1968, offered to make arrangements with Mrs. Rawls for use of the home for photographing the following day.

At about 3:00 to 4:00 P.M. on November 1, 1968, Mrs. Penney, Mr. Parkinson, the model, the photographer and a professional hair dresser arrived at the Rawls residence. No confirmation of the right to photograph Mrs. Rawls' home had been received from Mrs. Morgan. Mrs. Rawls was not at home. After speaking with the plaintiff's eleven year old son, David Rawls, Mrs. Penney saw Mrs. Rawls' fourteen year old daughter, Zan Rawls, arrive home. Mrs. Penney explained to her that the party was from Vogue magazine and that

Mrs. Morgan was supposed to have made arrangements to photograph the house. Zan Rawls tried to telephone her father to see if he had been contacted, but was unable to do so. Mrs. Penney called Mrs. Morgan and asked if she had been able to get in touch with Mrs. Rawls. Mrs. Morgan said, "No", but stated that she thought it would be all right to photograph there. Zan Rawls told Mrs. Penney that it would be all right to come in and take pictures. Both children assisted in taking the fashion pictures, which utilized the interior of the house and one of the chairs and a footstool as a background for the fashion model.

About thirty to forty-five minutes later Mrs. Rawls returned home. From this point the accounts of the witnesses differed as to what transpired. The plaintiff testified at trial that she was very much frightened when she returned to find several strangers in her home engaged in a photography session. She further testified that she requested the defendant's employees to leave immediately. Her cross-examination of the Nast group sought to establish these points. The testimony of Mrs. Penney, Mr. Parkinson and others of their party, on the other hand was to the general effect that the plaintiff did not appear unduly upset upon her return and that she acquiesced in the expressed desire of Mr. Parkinson to remain on the premises and complete the picture taking under the existing light conditions. Mrs. Penney and her associates thereupon completed their photographing work and departed the scene. This took thirty minutes or less to accomplish.

The two Morgans ate dinner with Mr. Parkinson and Mrs. Penney that evening at a Jacksonville Beach restaurant, The Chateau. During dinner Mrs. Penney expressed regret that they had startled Mrs. Rawls that afternoon, and Mrs. Morgan replied "Don't worry about it. It's perfectly all right. The house has been photographed many times".

On December 6, 1968, the plaintiff's attorney, Mr. Dittmar, appeared at the New York offices of Vogue magazine. He inquired about the photographs that had been taken in Jacksonville on November 1, 1968, and was shown a fashion layout which was to be published in the February 1, 1969 issue of the magazine. The layout included one of the pictures taken from inside the plaintiff's home looking out toward the Jaguar automobile with Mrs. Rawls' patio in the background. The model was shown full figure, in profile, seated in a lawn chair, and the Rawls' Dalmation dog appeared in the picture. Mr. Dittmar thereupon informed defendant's counsel that Mrs. Rawls objected to the publication of any picture taken in her home on November 1, 1968. The defendant refused to withdraw the picture from publication, stating that the February 1 issue was too far advanced toward final form to permit this, but did eliminate from the photographic negative everything which identified it with or related to Mrs. Rawls' house, yard, dog and furnishing with the exception of the chair in which the model was sitting and a footstool. The chair's appearance was considerably altered by retouching the negative. As so changed, the fashion picture appeared in the February 1, 1969 issue of Vogue in the lower lefthand corner of page 50, as part of a layout of several pages featuring B. H. Wragge clothing and Jaguar automobiles.

It suits our purposes to deal with Mrs. Rawls' cross-appeal as to Count One before proceeding to a discussion of the main appeal of Conde Nast as to the recovery under Count Two.

I. *The Intrusion Count*

Count One of the complaint alleged that the defendant, acting through its employee-agents, invaded the plaintiff's

privacy by means of a wrongful entry and unauthorized physical intrusion into the plaintiff's home on November 1, 1968. It further alleged that, as a result of the defendant's wrongful acts, the plaintiff had been deprived of her right to privacy and of her right to the exclusive and unfettered use and possession of her home, causing the plaintiff mental and physical suffering and to become frightened, nervous, upset and insecure in her home. Count One further alleged that the defendant's acts had been committed wilfully, unlawfully, maliciously, and with total and wanton disregard for plaintiff's rights, for which compensatory damages in excess of $1,000 and punitive damages of $1,000,000 were sought. The demand for compensatory damages in excess of $1,000 was framed to meet the lower jurisdictional limitations of the state court of general jurisdiction. The trial judge, at the request of the defendant, and over the objections of the plaintiff, gave the following instructions respecting Count One to the jury as part of his general charge:

> "If you find, ladies and gentlemen, from a preponderance of the evidence that the plaintiff, Mrs. Rawls, after she came home, by her conduct gave her actual or implied consent for the defendant's employee to remain in her home and to continue to take photographs, then you cannot award her any damages as to Counts One and Two for wrongful entry or invasion of privacy."

During the course of the jury's deliberations, the jury foreman sent an inquiry to the trial judge:

> "If the Conde Nast people entered without Mrs. Rawls' consent, but stayed with her implied consent – are they guilty of trespass?

Plaintiff's counsel urged the trial judge to answer the ques-

tion in the affirmative. The trial judge declined to do so. Instead, upon the jury's return to the courtroom, he reread a portion of his original charge, including the above-quoted excerpt. The giving of this instruction is assigned as error by the plaintiff on her cross-appeal.

In *Thompson v. City of Jacksonville* (Fla. 1st D.C.A. 1961), 130 So.2d 105,[1] it was held that a complaint charging that city police officers negligently broke into and searched the plaintiff's premises with negligent disregard for the plaintiff's right to privacy was sufficient to state a cause of action for invasion of privacy. In her appeal, the plaintiff argues that the trial judge erroneously obstructed her efforts to prove a *Thompson* type case to the jury by injecting the allegedly irrelevant factor of consent into its deliberations.

Harper and James, with regard to the defense of consent to a tort, states:

> "The general principle that one may not complain of acts to which he has consented is applicable to entries and other intrusions on land. A trespass on land is an intentional intrusion without the consent of the possessor and without a privilege conferred by law irrespective of the possessor's consent. Indeed, the word 'intrusion' implies that there is no consent since one who has expressed a willingness that another come onto his land will hardly regard the entry which he has thus authorized as an 'intrusion'.
>
> "Frequently, perhaps more often than otherwise, the consent will be implied rather than expressed. Con-

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[1]We attempt to follow Florida substantive law in this diversity case as to both counts, under *Erie Railroad Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Neither party to this appeal questions that it is appropriate so to follow Florida law.

> sent may be implied from custom, local or general, from usage or from the conduct of the parties, or some relationship between them." Harper and James, The Law of Torts, Sec. 1.11, page 38.

Dean Prosser discusses the defense of consent in the following manner:

> "Chief among the other defenses available in a privacy action is that of the plaintiff's consent to the invasion, which will bar his recovery as in the case of any other tort . . ." Prosser, Law of Torts, 3rd Ed. 1964, Sec. 112, page 850.

The Restatement of the Law of Torts more closely addresses itself to the plaintiffs view of the facts of his case in its discussion of subsequent assent to a tortious act:

> "Except in the case of ratification, subsequent assent by the injured person to a tortious act does not of itself terminate a cause of action. There is no principle under which a tort can be condoned; an agreement not to sue is effective only if it has the elements of an enforceable contract. Thus where one assaults another, a statement by the injured person that he forgives the assault does not terminate the cause of action." Restatement of the Law of Torts, Am. Law. Inst., (1939), Section 892, comment c, page 841.

We agree with the Restatement and the plaintiff that, strictly speaking, the defendant may avail itself of the defense of consent only if the consent existed at the time the intrusion took place. Nevertheless, we conclude that the lower court's judgment should be upheld even though the jury was imprecisely instructed in terms of the doctrine of consent.

The legal theory underlying Florida's cause of action for the tortious invasion of privacy is succinctly set out in 32 Florida Jurisprudence, Torts, Section 9, pages 136-137:

> "The Florida court recognizes a right of privacy, distinct in and of itself and not merely incidental to some other right, for the violation of which an action for damages will lie. The right of privacy is essentially the right to be let alone. The right is violated by the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."

Our research and the research of counsel in this matter have failed to disclose any reported Florida cases dealing with the exact point, but we believe that Florida courts, presented with a similar factual situation, would sanction a jury instruction similar to the one objected to by plaintiff but would couch it in terms of waiver or estoppel rather than consent. As stated in the Florida Jurisprudence discussion quoted above, the cause of action for the tortious invasion of privacy has as a principal objective the compensation of a party for the "outrage" or "mental suffering, shame, or humiliation" caused by the invasion. If at the time of the alleged invasion the plaintiff made no meaningful effort to protect her privacy or demonstrated no visible emotional distress, but rather acquiesced in the continued presence of the defendant's employees in her home, we can perceive no legitimate reason for preventing the jury from taking the plaintiff's reactions to the presence of the defendant's employees into account in determining her entitlement to recover damages. Although it may have been error to instruct the jury in this case in terms of consent, the error

was technical only, and not harmful. The trial judge's direction of the jury's attention to the actions and demeanor of the plaintiff upon her return to her home is not ground for reversal.

II. *The Publication Count*

Count Two of the complaint realleged by reference Paragraphs 1-8 inclusive of Count One[2] and alleged further in substance: The discovery by plaintiff on December 6, 1968, of defendant's plan to publish one of the pictures taken in her home in the February 1, 1969 issue of "Vogue" magazine, plaintiff's immediate demand that defendant publish none of the November 1, 1968 photographs taken in her home or any captions, headlines, articles, stories or editorial material relating to or arising out of the illegal entry of her home, (paragraph 10); the wrongful publication of one of said photographs by defendant in the February 1, 1969 issue of "Vogue" on page 50 in an article entitled "from riches to wragge and jaguars", with knowledge of plaintiff's objection, (paragraph 11); and that thereby defendant wrongfully and maliciously invaded plaintiff's right of privacy, subjecting plaintiff to further mental and physical suffering. Again there

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[2]Paragraphs 1-9 inclusive of Count One comprised generally its factual allegations of state court jurisdictional amount, identification and relationship of the parties, the Vogue party's wrongful entry, their setting up for and taking of pictures at Mrs. Rawls' home, Mrs. Rawls' return to find the strangers present in her home, her surprise, her fright and indignation, her request that the Vogue party leave immediately and their delay and refusal to leave until further photographs had been taken. The allegations of damage (paragraph 10), i.e., deprivation of the right to privacy, the right to the exclusive and unfettered use of her home, damage to her lawn, patio and furniture, plaintiff's mental and physical suffering, and resultant feeling of insecurity and lack of safety in her home, and that the defendant's wrongful acts were done wilfully, unlawfully, maliciously and with total and wanton disregard for plaintiff's rights (paragraph 11) were not carried forward into Count Two.

was a demand for compensatory damages in excess of $1,000 and for punitive damages of $1,000,000.

At the trial, the defendant established that the subject photograph had been significantly altered prior to its publication, so much so that it was impossible to identify the photograph as having been taken in the plaintiff's home. Citing the absence of any identification of the plaintiff's home in the published picture, the defendant moved for a directed verdict after both sides announced closed and for judgment notwithstanding the verdict after the jury delivered its verdict calling for $5,000 compensatory and $50,000 punitive damages. After denial of both motions judgment was entered for these amounts, timely followed by this appeal. Our examination of the record and study of applicable authorities convince us that the trial judge erroneously denied these motions. He should have granted judgment n.o.v. and entered final judgment for Conde Nast as to both counts.

Any consideration of Florida's jurisprudence respecting right to privacy must commence with *Cason v. Baskin*, Fla.Sup.Ct. 1944, 155 Fla. 198, 20 So.2d 243. That landmark Florida decision held that the plaintiff's complaint, which alleged that a description of a character by the defendant "sometimes known as Marjorie Kinnan Rawlings" in her book "Cross Creek" was so intimate and accurate as to unmistakably identify the plaintiff to her friends, stated a cause of action for the tort of invasion of privacy. *Harms v. Miami Daily News*, Fla.D.C.A. 3rd, 1961, 127 So.2d 715, at page 718, makes it clear that the plaintiff has the burden in such an action to prove that she has been publicly identified as a prerequisite to recovery for invasion of privacy. In our case the absence of public identification of the plaintiff's home or possessions (as already indicated, all possibility of identification was carefully obliterated before publication) precludes recovery and

should have mandated the granting of defendant's motions by the trial judge. Text writers on the subject generally agree with this view. Very simply put, the plaintiff may not recover for invasion of privacy when, as here, her privacy remains inviolate. Hanson, *Libel and Related Torts*, page 204 states:

> "As in defamation, there must be some reasonable grounds for concluding that it is the plaintiff whose privacy had been invaded. Thus, recovery has been denied for the publication of photographs of only plaintiff's home, or of other possessions, with no further reference to the plaintiff. However, it is not necessary to name or picture the plaintiff in order to make actionable reference to him, if sufficient identification is otherwise made."

Prosser, *Law of Torts*, Section 112, page 841, puts it as follows:

> "On the other hand there is no liability for the publication of a picture of his hand, leg or foot, or his house, his automobile or his dog, with nothing to indicate whose they are."

Finally, Hofstrader and Horowitz, in their *The Right of Privacy*, Section 5.7, page 44, state:

> "Though a person may feel it is an invasion of his privacy, the law is clear, that the right is not infringed by merely publishing a picture of something that belongs to him. Thus, it is not actionable to publish an interior scene of a person's dwelling house, or of his automobile, or of his dog, if his own likeness is not included."

Federal courts in other jurisdictions consistently have recognized that lack of public identification of the plaintiff disqualifies the plaintiff from recovery for invasion of privacy. *Branson v. Fawcett Publications, Inc.*, 124 F.Supp. 429 (E.D. Ill., 1954); *Young v. That Was the Week That Was*, N.D. Ohio 1969, 312 F.Supp. 1337, aff'd 6 Cir. 1970, 423 F.2d 265, are examples.

We have carefully examined the record in this case including the photograph in evidence in an effort to determine if the plaintiff's home was identifiable in the picture published in Vogue magazine. Not only was the plaintiff's home rendered unidentifiable as a result of the defendant's retouching prior to publication, but even the picture of the chair in which the model was sitting was altered beyond recognition.

Our resolution of the identification issue makes it unnecessary for us to deal with the defendant's contention that the trial judge erred in submitting to the jury the appropriateness of punitive damages with respect to Count Two of the complaint. *McLain v. Pensacola Coach Corp.*, Fla. Sup. Ct. 1943, 152 Fla. 876, 13 So.2d 221; *Hutchinson v. Lott*, Fla. 1st D.C.A. 1959, 110 So.2d 442.

One additional observation is in order. Counsel for Mrs. Rawls at oral argument and on brief seek to uphold the verdict for damages under Count Two by urging that the earlier *physical intrusion* (realleged in Count Two) made it unnecessary for publicity to be present or for identification to be possible to allow recovery, citing *Fowler v. So. Bell Tel. & Tel. Co.*, 5 Cir. 1965, 343 F.2d 150, 156; Prosser on *Torts*, Sections 97 and 112, and *Santiesteban v. Goodyear Tire and Rubber Co.*, 5 Cir. 1962, 306 F.2d 9, 11, emphasizing generally that *except in cases of physical intrusion* the tort of in-

vasion of privacy must be accompanied by publicity. The argument appears to be that Count Two was some sort of hybrid count involving *both* unlawful physical intrusion (or trespass) *and* invasion of privacy by publication of the picture. The argument we think is afterthought and demonstrably unsound. A major flaw in the contention is that the jury by its verdict as to Count One specifically found Conde Nast not guilty of the claimed intrusion. It cannot then be included in Count Two as a make-weight to escape the necessity of proving publicity. We view the incorporation into Count Two of the portions of Count One describing the claimed intrusion or trespass as having been done simply by way of inducement, setting the background, not as an effort to plead some sort of combined cause of action. The claim in Count Two is one for invasion of privacy by publication of the picture, and may not be enlarged into something else. Mrs. Rawls and her counsel read into the cited authorities much more than they stand for.

Fowler, supra, held that "tapping a telephone" (without plaintiff's knowledge or consent) "amounts to an intrusion upon plaintiff's solitude as to which no publication of the overheard information is necessary" under Georgia law, citing *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 1939, 60 Ga. App. 92, 2 S.E.2d 810.

In *Santiesteban*, which arose under Florida law, we held that in absence of clear Florida precedent where a buyer of tires and tubes was current in his installment payments therefor, a claim was stated for recovery of invasion of privacy when it was alleged that agents of defendant tire company seller removed the tires and tubes from the car without complaint or notice to buyer and left the car standing on its rims in full view of buyer's fellow employees and others, and that legal certainty for want of jurisdictional amount was

lacking where buyer sought more than $10,000 as punitive damages and as compensatory damages for embarrassment, humiliation and wounded feelings, for two sleepless nights and medication as well as loss of use of the car. The statement quoted from *Santiesteban* is lifted out of context and is no support for Mrs. Rawls' position.

REVERSED and RENDERED as to The Conde Nast Publications, Inc.'s appeal; AFFIRMED as to Cross-Appeal of Betty B. Rawls.

JUDGMENT

(Entered July 13, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30009

Before TUTTLE, AINSWORTH and SIMPSON, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and rendered as to The Conde Nast Publications, Inc.'s appeal; and that this cause be and the same is hereby affirmed as to the cross-appeal of Betty B. Rawls in accordance with the opinion of this court;

It is further ordered that plaintiff-appellee-cross appellant pay to defendant-appellant-cross appellee the costs on appeal to be taxed by the Clerk of this Court.

July 13, 1971

Issued as Mandate:

App. 25

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

BETTY B. RAWLS,
Plaintiff-Appellee-Cross-Appellant,

versus

No. 30009

THE CONDE' NAST PUBLICATIONS, INC.,
Defendant-Appellant-Cross Appellee.

The Clerk is requested to tax the following costs against BETTY B. RAWLS, Plaintiff-Appellee-Cross-Appellant

COURT COSTS TAXABLE UNDER RULE 39, FRAP	REQUESTED	ALLOWED
Docketing Fee	25 00	
Cost of Printing Record or Appendix	3,568 96	
Cost of Printing Appellant's Brief (28 total pages)	499 20	
Cost of Printing Appellee's Brief		
Cost of Printing Appellant's Reply Brief (17 total pages)	367 12	
TOTAL	4,460 28	

State of FLORIDA
County of DUVAL

ss:

I, DAVISSON F. DUNLAP do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. The printer's itemized statement showing the actual cost per page for the appendix and briefs is attached. A copy hereof was this day mailed to opposing counsel, with postage fully prepaid thereon.

Davisson F. Dunlap
(Signature)

Attorney for The Conde' Nast Publications, Inc., Defendant-Appellant-Cross-Appellee.

Subscribed and sworn to before me this 23rd day of July A.D., 1971 at Jacksonville, County of Duval, Florida.

S/ Betty M. Williamson (Asst.)
Notary Public

Notary Public, State of Florida at Large
My Commission Expires

Costs are hereby taxed in the amount of $ this day of , 19

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NOTE: SEE REVERSE SIDE FOR INSTRUCTION AND RULE 39 ON TAXING COSTS.

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App. 27

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B-84	40	Law Briefs "The Coale Hush Publications, Inc. vs Betty B. Rawls"	333.00	14.13	347.13

OBJECTIONS TO TAXING OF COSTS

(Filed July 30, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30,009

Plaintiff-appellee and cross appellant Betty B. Rawls objects to the Clerk's taxing the Bill of Costs served and filed by the defendant-appellant and cross-appellee upon the following grounds:

1. Plaintiff-appellee and cross appellant will file a petition for rehearing on or before August 10, 1971 as permitted by this Court's order dated July 19, 1971, and costs should not be taxed before disposition of that petition for rehearing.

2. In any event the appendix includes unnecessary portions of the record in that pages 785 through 956 inclusive of the appendix are a needless duplication of pages 80 through 251 of the appendix, and costs should not be taxed for those portions.

3. The costs sought to be taxed are excessive in the quantity of copies involved and in the per page rates.

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JOHN A. DeVAULT, III
By /s/ C. HARRIS DITTMAR
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Jacksonville, Florida 32202
Attorneys for Plaintiff-Appellee and Cross Appellant

BEDELL, BEDELL, DITTMAR, SMITH & ZEHMER
1520 Barnett Bank Building
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Of Counsel

ORDER
(Filed August 11, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30009

IT IS ORDERED that the motion of appellee-cross appellant objecting to taxing of costs, filed in the above styled and numbered cause, is hereby over-ruled and denied in all respects.

/s/ BRYAN SIMPSON
UNITED STATES CIRCUIT JUDGE

ORDER ON PETITION FOR REHEARING
(Entered September 9, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30009

Before TUTTLE, AINSWORTH and SIMPSON,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

MOTION FOR STAY OF MANDATE

(Filed September 17, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30,009

Plaintiff-appellee and cross appellant Betty B. Rawls moves the Court to stay the mandate in this cause pursuant to the provisions of Rule 41, Federal Rules of Appellate Procedure, pending her application to the Supreme Court for a writ of certiorari.

C. HARRIS DITTMAR
JOHN A. DeVAULT, III
By /s/ C. HARRIS DITTMAR
1520 Barnett Bank Building
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Attorneys for Plaintiff-Appellee and Cross Appellant

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1520 Barnett Bank Building
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Of Counsel

MOTION TO REQUIRE BOND FOR COSTS

(Filed September 24, 1971)

UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

NO. 30009

The Appellant, The Conde' Nast Publications Inc., by its undersigned Attorneys, moves the Court to require the Appellee-Cross Appellant, Betty B. Rawls to post bond for The Conde' Nast Publications Inc. costs in the amount of $4,460.28, in the event the Appellee-Cross Apellant's, Betty B. Rawls Motion For Stay of Mandate filed herein is granted.

In support of its Motion, The Conde' Nast Publications Inc. would show unto this Court that it filed its bill of costs herein on July 23rd, 1971, in the amount of $4,460.28, and that Betty B. Rawls Motion objecting to the taxing of costs was overruled and denied in all respects by this Court on August 11th, 1971. Betty B. Rawls has since filed a petition for certiorari to the United States Supreme Court and has filed a Motion for Stay of Mandate. The Conde' Nast Publications Inc. submits that a bond to cover its taxable costs to date is therefore necessary and proper to protect its interests in this matter.

Respectfully Submitted,

/s/ DAVISSON F. DUNLAP
Davisson F. Dunlap
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830 American Heritage Building
Jacksonville, Florida 32202
Attorneys for Appellant,
The Conde' Nast Publications Inc.

ORDER

(Filed September 29, 1971)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 30009

ON CONSIDERATION OF THE APPLICATION of the plaintiff-appellee-cross appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable plaintiff-appellee-cross appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED THAT, upon plaintiff-appellee-cross appellant giving bond in the sum of five thousand DOLLARS ($5000.00) with good and sufficient security to be approved by the undersigned, with condition that, if plaintiff-appellee-cross appellant fails to make application for such writ within the period alloted therefor, or fails to obtain an order granting said application, or fails to make her plea good in the Supreme Court, plaintiff-appellee-cross appellant shall answer for all damages and costs which the other party may sustain by reason of the stay, the issue of the mandate of this Court in said cause be, and the same is stayed for a period of thirty (30) days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty (30) days from the date of this order there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty (30) days from the date of this order, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

DONE this 28th day of September, 1971.

/s/ BRYAN SIMPSON
UNITED STATES CIRCUIT JUDGE

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In the Supreme Court of the United States

October Term, 1971

No. 71-591

BETTY B. RAWLS,

Petitioner,

versus

THE CONDE NAST PUBLICATIONS INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVISSON F. DUNLAP
Counsel of Record

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Of Counsel

INDEX

OPINION BELOW 1

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In the
Supreme Court of the United States

October Term, 1971

No. 71-591

BETTY B. RAWLS,

Petitioner,

versus

THE CONDE NAST PUBLICATIONS INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The judgment of the United States District Court for the Middle District of Florida which was reversed by the Court of Appeals for the Fifth Circuit is printed in Petitioner's Appendix (Pet. App. 9). The Opinion of the Court of Appeals for the Fifth Circuit is reported at 446. F. 2d 313 and is printed in Petitioner's Appendix (Pet. App. 10-23).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals' decision in reversing the judgment entered upon Petitioner's claim of invasion of right of privacy, based upon an alleged wrongful publication of a photograph in which the Petitioner was not identified, creates any issue which would warrant the exercise of certiorari jurisdiction by this Court.

STATEMENT OF FACTS

A. Scope of the Action

The Petitioner's Complaint contained two counts (Pet. App. 1-5). Count One sought compensatory and punitive damages for an alleged trespass and invasion of her home and the improper taking of pictures in her home without her consent; Count Two sought compensatory and punitive damages for an alleged invasion of her privacy arising from the wrongful publication in *Vogue* magazine of one of the pictures which had been taken in her home. Count Two realleged the factual allegations of Count One and added as the only basis for the additional count, the wrongful publication of a picture of her chair and footstool which appeared in the February 1, 1969 issue of *Vogue* magazine as part of an advertising layout. The Court of Appeals found that Count Two alleged a claim for invasion of privacy by a wrongful publication of a picture (Pet. App. 22).

B. Facts

The facts emerging from the evidence at the trial are stated fully in the Opinion of the Court of Appeals (Pet. App. 11-13; 446 F. 2d at pp. 314, 315).

C. Proceedings in the District Court and Court of Appeals

In the District Court, the jury returned a verdict for the Defendant on Count One and a verdict for the Plaintiff on Count Two in the amount of $5,000 compensatory damages and $50,000 punitive damages. The District Judge denied Plaintiff's motion for a new trial as to Count One and Defendant's motion for judgment notwithstanding the verdict as to Count Two, and a judgment was entered upon the verdict.

Upon appeal, the Court of Appeals affirmed the judgment of the District Court as to Count One, reversed the judgment as to Count Two and subsequently denied the Petitioner's petition for rehearing.

ARGUMENT

The issue in the present case is narrow and unique to its facts and no amount of rhetoric can convert it into one warranting review on certiorari.

The petition seeks to have this Court review the factual determination of the Court of Appeals. The Petitioner's attempt to turn this conventional action of the Court of Appeals, in correcting a legal error in the lower court, into a constitutional issue, is not well founded. There is no showing made in the petition that there are here present any special or important reasons, indicated in Rule 19 of the Rules of this Court, for the exercise of this Court's discretion to grant the writ. The decision below turns upon its own particular facts and the applicable local law.

The basis of Petitioner's argument is the unique and unusual contention that Florida law in right of privacy actions based upon a publication of a photograph, requires no identification of the plaintiff.

Petitioner contends that the Court of Appeals improperly analyzed her cause of action in Count Two as a claim for wrongful publication, rather than a hybrid count which included a claim for physical intrusion, in an attempt to avoid the requirement of identification. It is significant that the Petitioner does not cite a single decision or authority in support of her view that a wrongful publication claim requires no identification of the plaintiff.

Under such a situation involving a consideration of particular facts, it is clear that this Court, under Rule 19 of its Rules, and under numerous decisions with respect to the exercise of its certiorari jurisdiction, has declared it will not interfere with a judgment of a Court of Appeals where its conclusions depend solely upon an analysis of the particular facts involved. *Stern & Gressman,* Supreme Court Practice § 4-14, 3rd Ed. 1962. As well stated by Justice Frankfurter in *National Labor Relations Board v. Pittsburgh Steamship Company,* 340 US 498, 71 S Ct 453, 95 L ed 479, at pp. 502, 503 of 340 US:

> The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.
>
> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.

On many occasions this Court has held it would not grant a writ of certiorari merely to review the evidence or inferences drawn from it, or discuss specific facts. *United States v. Johnston,* 268 US 220, 227, 69 L ed 925, 926, 45 S Ct 496; *Houston Oil Co. v. Goodrich,* 245 US 440, 62 L ed 385, 38 S Ct 140;

Southern Power Co. v. North Carolina Public Service Co., 263 US 508, 68 L ed 413, 44 S Ct 164, *General Talking Pictures Corp. v. Western Electric Co.*, 304 US 175, 178, 82 L ed 1273, 1275, 58 S Ct 849.

THE DECISION BELOW IS CORRECT

A review of the Opinion of the Court of Appeals below shows clearly that its decision in reversing the jury verdict as to Count Two was correct. The Court of Appeals properly held that the Petitioner's claim in Count Two of the Complaint was one for invasion of privacy by publication of the picture and may not be enlarged into something else (Pet. App. 22).

The Petitioner does not refute the Florida law, cited by the Court of Appeals, which holds that in a wrongful publication case there must be a public identification of the plaintiff, her home or possessions in order to violate a claim for invasion of privacy. *Cason v. Baskin*, Fla. S Ct 1944, 155 Fla. 198, 20 So. 2d 243; *Harms v. Miami Daily News*, Fla. D.C.A. 3d, 1961, 217 So. 2d 715 (Pet. App. 19). The Petitioner does not dispute the finding of the Court of Appeals that as a matter of law there was no evidence of any identification of the plaintiff in the picture published in *Vogue* magazine. Since there is no evidence in the record showing the required identification of the plaintiff under Count Two, the alleged erroneous charge to the jury relating to implied consent, with respect to the physical intrusion of the plaintiff's home, is not determinative of or important to the resolution of Petitioner's claim in Count Two. Therefore, any alleged error with respect to the jury charge on actual or implied consent, is harmless.

In the Court of Appeals Petitioner sought to have the jury verdict against her as to Count One reversed and a new trial

ordered, and sought to have the Court of Appeals, as to Count One, do what it did with respect to Count Two, namely, reverse a jury verdict. In making such contention before the Court of Appeals, the Petitioner did not appear to be concerned that such action might involve a violation of the Seventh Amendment if the Appellate Court set aside the Respondent's verdict of Not Guilty on Count One.

The Court of Appeals properly held that the instructions, considered as a whole, were in accordance with the law. In view of the Second and Sixth Defenses of the Petitioner (Pet. App. 7, 8) raising the defenses of consent, implied consent, waiver and estoppel, and the evidence which showed the Petitioner permitting the agents of the Respondent to remain in her home and continue to take the photographs, the trial court properly instructed the jury to consider such evidence in determining the Petitioner's right to recover damages with respect to the physical intrusion claim. The Court of Appeals followed the proper rule in reviewing the disputed charge by considering the instruction as a whole and not out of context. *General Insurance Company of America v. Hercules Construction Co.*, (8th Cir., 1967) 385 F. 2d 13, 24; *Bush v. Louisville and Nashville Railroad Company*, (5th Cir. 1958) 260 F. 2d 854, 857.

THERE IS NO CONFLICT OF DECISION

Petitioner seeks to have this court exercise its certiorari jurisdiction on the ground that the decision below is erroneous because it appears to be in conflict with the general rules of law found in certain decisions of this Court, which were adjudicated upon different factual situations and involve other fields of the law. Manifestly there is no important question

requiring decision by this Court, since this case only involves the interest of this particular litigant. There is no assertion of any conflict between decisions of the Courts of Appeals or of any of the other reasons set forth in Rule 19 of this Court. There is no real conflict shown in the cited decisions of this Court on the same matter or law presented under the facts of this case, but only an asserted claim of conflict in the general principles utilized in those decisions.

Petitioner does not cite any right of privacy cases in this Court in conflict with the decision of the Court of Appeals or any other cases which, on the individual facts presented herein, are controlling or persuasive. Petitioner relies principally on a selected group of F. E. L. A. cases, supplemented by several cases under the Jones Act (Merchant Marine), Longshoremen's and Harbor Workers' Compensation Act, to support her contentions. It has been recognized by both this Court and the authorities that, because of the unique problems which had arisen in connection with the federal statutes involved in those cases, this Court, in a selected group of those cases, has exercised certiorari jurisdiction to review the decisions of courts of appeals which had reversed trial court judgments based upon jury verdicts. *Rogers v. Missouri Pacific Railroad Company,* 352 US 500 at p. 510, 77 S Ct. 443 and 1 L ed 2d at p. 493, and the dissenting opinion of Mr. Justice Frankfurter at p. 524 of 352 US; 67 Harvard Law Review 1441. No such particularized problems are asserted in the case at bar. It should be pointed out that the cases cited by the Petitioner do not deal with the problem, as presented in this case, where the District Court gave the case to the jury upon an erroneous view of the essential elements required for a particular cause of action. Petitioner's selected cases mainly concern whether there was a sufficient quantum of evidence for the cause to be submitted to the jury for decision. Additional cases cited by the

Petitioner are criminal cases which involve different rules with respect to the required quantum of evidence and multiple verdicts than are involved in civil cases.

The Seventh Amendment does not prevent the Court of Appeals from reviewing questions of law presented by the decision of a trial court on post trial motions when the action of the trial court amounts to a legal error. *Whitman v. Petrie*, (5th Cir. 1955) 220 F. 2d 914. The tortured factual speculation which the Petitioner engages in with respect to the verdicts on Count One and Count Two is illustrative of the factual speculation which Petitioner urges upon this Court as a ground for the exercise of its jurisdiction. The observation of the Court of Appeals with respect to the jury's verdict on Count One was made after their resolution of the identification issue with respect to Count Two (Pet. App. 21) and was labelled as an observation. This is the slender reed upon which the Petitioner rests her claim of a violation of her constitutional rights under the Seventh Amendment.

In none of the alleged cases cited by Petitioner as controlling Florida Law (Pet. 5), which the Petitioner claims the Court of Appeals ignored, was there an element of waiver or estoppel or implied consent presented in the facts of the case. They clearly do not, under the facts present in this case, support Petitioner's contention as to the status of the Florida law.

The decision of the Court of Appeals has not been shown to be wrong so as to present a substantial constitutional question, nor does it present an unusual case which raises any significant legal questions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 71-591

BETTY B. RAWLS,

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vs.

THE CONDÉ NAST PUBLICATIONS, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

I.

The decision and judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed (446 F.2d 313) is in conflict with the decision of the Court of Appeals for the Ninth Circuit in Dietemann v. Time, Inc. (9th Cir. 1971), 449 F.2d. 245, reported subsequent to the filing of the petition for writ of certiorari.

In the instant case respondent's agents entered petitioner's home without her consent while she was absent, took pictures in petitioner's home, and subsequently published one of those

pictures over petitioner's objections. The jury found for petitioner on Count Two which complained of the unauthorized intrusion and the publication of the photograph obtained through that intrusion, awarding petitioner compensatory and punitive damages. The District Judge entered judgment for petitioner on the jury's verdict and denied respondent's motion for judgment notwithstanding verdict. The Court of Appeals for the Fifth Circuit reversed the judgment for petitioner, specifically rejecting as "unsound" petitioner's efforts

> ". . . to uphold the verdict for damages under Count Two by urging that the earlier *physical intrusion* (realleged in Count Two) made it unnecessary for publicity to be present or for identification to be possible to allow recovery . . . . The argument appears to be that Count Two was some sort of hybrid count involving *both* unlawful physical intrusion (or trespass) *and* invasion of privacy by publication of the picture."
>
> (446 F.2d at 319; App. 21-22).

In *Dietemann* v. *Time, Inc.* (9th Cir. 1971), 449 F.2d 245, defendant's agents gained entrance to plaintiff's home by subterfuge and took photographs and recordings with hidden equipment. In affirming the award of damages for invasion of plaintiff's privacy, the Court held that

> ". . . publication is not an essential element of plaintiff's cause of action"
>
> (449 F.2d at 249)

but further held that the subsequent publication of information acquired by the intrusion enhances the compensable damages, saying:

> "No interest protected by the First Amendment is adversely affected by permitting damages for intrusion

> to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men."
>
> (449 F.2d at 250).

The decisions are in direct conflict. The decision of the Ninth Circuit correctly applies the law of invasion of privacy to uphold the sanctity of the home and to chill intrusive acts; the decision of the Fifth Circuit deprecates the law of invasion of privacy, thereby sacrificing the sanctity of the home and encouraging conduct "that grossly offends ordinary men."

Because the conflicting decision of the Ninth Circuit was reported subsequent to the filing of the petition for writ of certiorari, the Court should grant a rehearing and should vacate its order denying the petition.

II.

The decision sought to be reviewed so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The proceedings in the instant case have produced a result that is unjust, and only this Court has the power to right

this judicial wrong. The series of events which have brought petitioner, an innocent victim of respondent's wrongful acts, to the point of financial ruin as respondent's judgment debtor, may be simply stated:

(a) The evidence shows, without dispute, that respondent's agents entered petitioner's home without her consent or prior knowledge while petitioner was absent from her home and while her home was in the care of her minor children.

(b) The entry into petitioner's home was made by respondent's agents deliberately and with knowledge that petitioner had not consented thereto, for the purpose of using petitioner's home to further respondent's business by producing advertising income.

(c) When petitioner returned to her home to find respondent's agents, she did not attempt to forcefully eject them but (according to the disputed evidence most favorable to respondent) acquiesced to respondent's agents' request "to remain on the premises and complete the picture taking under the existing light conditions" (446 F.2d at 315; App. 12), upon being assured by respondent's agents that they would soon be through and would then leave her home.

(d) Under Florida law the entry by respondent's agents of petitioner's home without her consent was an actionable tort entitling petitioner to at least nominal damages. [*Leonard* v. *Nat Harrison Associates, Inc.* (Fla. App. 2d Dist. 1960), 122 So.2d 432, 433; *Kelliher* v. *Stone & Webster, Inc.* (5th Cir. 1935), 75 F.2d 331, 333.]

(e) Petitioner filed suit in the state court of Florida to enforce the claim for damages which she had against respondent under the law of Florida.

(f) Respondent removed petitioner's case to the United States District Court because of diversity of citizenship.

(g) The case was tried before a jury which awarded petitioner $5,000 in compensatory damages and $50,000 in punitive damages on Count Two and found for the respondent on Count One.

(h) The trial judge entered judgment on the jury's verdict.

(i) The Court of Appeals held that the trial judge erred in instructing the jury that subsequent consent would bar petitioner from recovering damages from the wrongful intrusion alleged in Count One because "the defendant may avail itself of the defense of consent only if the consent existed at the time the intrusion took place" (446 F.2d at 316; App. 16), but then arbitrarily held that "the error was technical only, and not harmful." (446 F.2d at 317; App. 17-18), and affirmed the judgment on the jury's verdict for respondent as to Count One.

(j) The Court of Appeals then reversed the judgment entered for petitioner as to Count Two, upon the predicate that the jury's finding for respondent as to Count One (resulting from the "technically erroneous" charge) was a specific finding that there was no wrongful intrusion as alleged in Count Two.

(k) The Court of Appeals denied petitioner's petition for rehearing which requested that the case be remanded for a new trial by jury correctly instructed as to the law as pronounced by the Court of Appeals' decision.

(l) The Court of Appeals denied petitioner's objections to respondent's cost bill for $4,460.28 in appellate costs.

Thus petitioner, who was legally wronged by respondent, who, under the applicable Florida law, was entitled to a judgment against respondent for at least nominal damages under the law of the State of Florida, and who obtained a jury verdict awarding her compensatory and punitive damages, now finds herself a judgment debtor in the amount of $4,460.28 to the tort-feasor who began it all by wilfully entering her home without her consent. Such distorted justice cries out for correction by this Court.

CONCLUSION

For reasons set forth herein, as well as those set forth in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner I hereby certify that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2).

C. Harris Dittmar